SUPREME COURT, U. S.

MAR 9 19

JOHN F. DAVIS, C

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1214

DONALD SMELTZ BUTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

RALPH RUDD,
RUDD, OBER & MILLER,
Public Square Building,
33 Public Square,
Cleveland, Ohio 44113,
Attorneys for Petitioner.

March 9, 1968.

(Attorneys for Respondent on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions Below	1
Grounds of Jurisdiction	1
Questions Presented	2
Constitutional Provisions	3
Statutory Provisions	4
Statement of the Case	6
Argument	10
A. Draft Curtails Fundamental Personal Liberties	10
B. Rational Basis Is Test For Commercial Regulation	11
C. Necessity Is Test For Law That Stifles Fundamental Personal Liberties	12
D. Considerations Governing Review on Certiorari	17
E. The Nature of the Evidence	18
F. The Right to Present Evidence of Constitutional Facts	22
1. The Rent Control Cases	23
2. The Shoddy and Bus Franchise Cases	24
3. Whitney v. California	25
4. The Borden and Carolene Cases	25
5. Smith v. California	27
6. Discussion	28
G. Subsidiary Issues	31
Conclusion	32
Appendix:	
Oral Opinion of District Court	1a

Transcript of Sentencing ---------- 13a
Judgment and Commitment ---------- 15a
Opinion of the United States Court of Appeals for the Sixth Circuit ---------- 16a
Judgment of the Court of Appeals for the Sixth Circuit ---------- 28a

TABLE OF AUTHORITIES.

Cases.

Aptheker v. Secretary of State, 378 U. S. 500, 1964 -- 13
Arver v. U. S., the Selective Draft Law Cases, 245 U. S. 366, 1918 ---------- 17
Bertelson v. Cooney, 213 F. 2d 275, 1954 ---------- 17
Block v. Hirsh, 256 U. S. 135, 1921 ---------- 23
Borden's Farm Products Company, Inc. v. Baldwin, 293 U. S. 194, 1934 ---------- 25
Chastleton Corporation v. Sinclair, 264 U. S. 543, 1924 ----------23, 30
Chicago Mercantile Exchange v. Tieken, 177 F. Supp. 660, 1959 ---------- 12
Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 1919 ---------- 17
Hammond, City of, v. Schappi Bus Line, 275 U. S. 164, 1927 ---------- 24
Katzenbach v. McClung, 379 U. S. 294, 1964 ------ 12
Kress, Dunlap & Lane, Inc. v. Downing, 286 F. 2d 212, 1960 ---------- 30
McCulloch v. Maryland, 4 Wheat. 316, 1819 -------- 17
Meyer v. Nebraska, 262 U. S. 390, 1923 ----------10, 11

NAACP v. Alabama, 377 U. S. 288 ---------- 14, 17, 18

Nebbia v. New York, 291 U. S. 502, 1934 ---------- 12

Shelton v. Tucker, 364 U. S. 479, 1960 ---------- 13, 17, 18

Smith v. California, 361 U. S. 147, 1959 ---------- 27

Thomas v. Collins, 323 U. S. 516, 1945 ---------- 12

U. S. v. Carolene Products Co., 304 U. S. 144, 1938 -- 12

U. S. v. Robel, -- U. S. --, 88 S. Ct. 419, 18 L. ed. 2d 508 ---------- 14, 16

Weaver v. Palmer Bros., 270 U. S. 402, 1926 ---------- 24

Whitney v. California, 274 U. S. 357, 1927 ---------- 25

Constitution and Statutes.

Constitution of the United States:

Art. I, Sec. 8 ---------- 3

Fifth Amendment ---------- 3, 6

Universal Military Training and Service Act, June 24, 1948, c. 625, Title 1, 62 Stat. 604, Public Law 759, 80th Congress (as amended June 19, 1951, c. 144, Title 1, Sec. 1(a), 65 Stat. 75, Public Law 51, 82nd Congress) ---------- 4-5

28 USC Sec. 1254(1) ---------- 1

Other.

Professor Dean Alfange, Jr., "The Relevance of Legislative Facts in Constitutional Law," 114 *University of Pennsylvania Law Review* 637, March, 1966 ---------- 28

Jean Carper, *Bitter Greetings*, Grossman Publishers, 1967 ---------- 30

Congressman Curtis, February, 1967, issue of *Playboy* magazine, page 168 ---------- 20

Federal Rules of Criminal Procedure, Rules 17(c) and 16(b) ---------- 31

How to End the Draft, The Case For An All-Volunteer Army, by Congressmen Stafford, Horton, Schweiker, Shriver, and Whalen, The National Press, Inc., 1967, pp. 113-123 ---------- 19

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

DONALD SMELTZ BUTLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

OPINIONS BELOW.

District Court: Opinion not reported. Transcript of oral opinion appears in the Appendix hereto at pages 1a to 13a.

Court of Appeals: Opinion reported at ___ Fed. 2d ___. Text is in the Appendix hereto at pages 16a to 28a.

GROUNDS OF JURISDICTION.

The decision of the United States Court of Appeals for the Sixth Circuit was rendered and filed on February 8, 1968.

The jurisdiction of this Court to review by certiorari is conferred by 28 USC Sec. 1254(1).

QUESTIONS PRESENTED.

I. In a criminal prosecution for refusal to report for induction by order of the Selective Service System, does the District Court trying the case have jurisdiction to entertain the defense that at the date of the alleged crime, February 4, 1964, the draft law violated the substantive due process requirement of the Fifth Amendment in that it broadly stifled fundamental personal liberties by conscription of manpower without necessity to do so because the valid Congressional purpose of providing for the common defense by raising and supporting an army could have been achieved as well or better by voluntary means if Congress had taken reasonable steps to provide better incentives for enlistment, chiefly through higher pay and greater opportunities for training and education?

Petitioner answers *yes*. The Court of Appeals answered *no*.

II. In such a case is it a denial of fair trial and reversible error for the trial judge to exclude all of the defendant's evidence tending to show conscription to be unnecessary, bar the defendant from access by subpoena to further such evidence possessed by the government, find the defendant guilty, and sentence him to prison?

Petitioner answers *yes*. The Court of Appeals answered *no*.

CONSTITUTIONAL PROVISIONS.

1. United States Constitution, Article I, Sec. 8:

"The Congress shall have power to lay and collect taxes * * * to * * * provide for the common defense * * * of the United States;

* * *

"To declare war * * *;

"To raise and support armies * * *;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

"* * *

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or offices thereof."

2. United States Constitution, Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

STATUTORY PROVISIONS.

I. Universal Military Training and Service Act, June 24, 1948, c. 625, Title 1, 62 Stat. 604, Public Law 759, 80th Congress.

Section 1(a), 50 USC App. Sec. 451(a) (as amended June 19, 1951, c. 144, Title 1, Sec. 1(a), 65 Stat. 75, Public Law 51, 82nd Congress):

"This act may be cited as the 'Universal Military Training and Service Act.' "

Section 1(b), 50 USC App. Sec. 451(b):

"The Congress hereby declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation."

Section 1(c), 50 USC App. Sec. 451(c):

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 4(a), 50 USC App. Sec. 454(a):

"Except as otherwise provided in this title, every male citizen of the United States * * * who attains the age of 18 years and six months after having been required to register pursuant to Section 3 of this title * * * shall be liable for training and service in the Armed Forces of the United States * * *. The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title * * * such

number of persons as may be required to provide and maintain the strength of the Armed Forces.

"* * *"

Section 4(b), 50 USC App. Sec. 454(b):

"Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged * * *."

Section 5(a), 50 USC App. Sec. 455(a):

"The selection of persons for training and service under Section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *."

Section 12(a), 50 USC App. Sec. 462(a):

"* * * any person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment * * *."

STATEMENT OF THE CASE.

Pursuant to the Universal Military Training and Service Act the defendant was ordered to report for induction into the armed forces on February 4, 1964. He failed to do so.

Indicted for this offense, he defends solely on the ground that at the time he was ordered to report for induction the draft law was unconstitutional in that it would have deprived him of his liberty and property and perhaps of his life without due process of law in violation of the Fifth Amendment to the Constitution of the United States. This is so, he says, because the Congressional purpose to provide for the common defense could have been accomplished by less drastic means than conscription, that is, by voluntary enlistment, if the incentives had been improved, chiefly by increased pay and opportunities for training.

Suggesting the truth of this thesis are extensive data and arguments presented in speeches of members of Congress and reproduced in the Congressional Record during the years 1963, 1964 and 1965. Apparently in response to the speeches and perhaps in anticipation of a group of them that were made on April 21, 1964, President Johnson, on April 18, 1964, directed the Defense Department to make a study of the draft selection system "including the possibility of meeting our requirements on an entirely voluntary basis," the study to be completed within a year.

In February, 1966, well in advance of his trial, the defendant moved for leave to subpoena the Secretary of Defense or his designated deputy able to produce the documents to be subpoenaed and to testify authoritatively on them to bring for examination by the parties and their attorneys that portion of the data assembled in

the course of the study that related to certain ideas specified in the proposed subpoena that had been advanced on the floors of Congress and which in the aggregate constituted the defendant's defense.

This motion was denied without opinion.

Thinking that the motion may have been denied because of the lack of specificity of the proposed subpoena as to the precise documents to be produced, the defendant made a second motion in May, 1966, for leave to subpoena a specific document, namely the preliminary draft report of the Defense Department study, which the defendant's attorney was informed had been completed.

This motion was denied likewise.

To the trial the defendant subpoenaed the Secretary of Defense or his designated deputy to produce both the data and the specific report covered by the pre-trial motion. In trial, the Court excluded such testimony from evidence.

Another kind of evidence that defendant subpoenaed for the trial was testimony of an expert, an economist with expert knowledge in this field who would have testified in support of the thesis that the draft could have been supplanted by a system of voluntary recruitment. His testimony also was excluded.

The third class of evidence that the trial court excluded consisted of copies of some of the Congressional speeches previously alluded to, some of them directly from the Congressional Record and some of them as assembled in the report of the hearings on the draft law that were conducted by the House Committee on Armed Services on June 22-24 and June 28-30, 1966. Similar evidence that was also excluded was testimony of certain Congressmen in the same Committee hearing in which they urged that conscription of manpower be replaced by voluntary enlistments.

Excluded also (a fourth class of evidence) was testimony of Assistant Secretary of Defense Robert Morris in the same Committee hearing containing an admission that the necessary manpower could be obtained by voluntary recruitment, although at increased expense.

At the conclusion of the trial the defendant was found guilty and sentenced to five years' imprisonment.

On appeal to the United States Court of Appeals for the Sixth Circuit, the remedy sought was for the conviction to be vacated and the case remanded to the trial court for a new trial, with directions to permit the defendant to subpoena in advance of trial the relevant evidence in the hands of the Government, to receive the relevant evidence bearing on the issue of necessity for the draft, and to determine whether or not conscription was reasonably necessary at the time of the defendant's alleged offense, and if not, to acquit the defendant on the basis of his constitutional defense.

The Court of Appeals responded to this request for relief in the following words:

> "We read, then, appellant's position to be that an issue of fact should be framed between his proffered evidence and the judgment of the Congress as to the necessity of the draft; this issue would then be submitted to a United States District Judge; the District Judge would have the power, upon his own evaluation of the evidence, to conclude that there was a better method of providing for the needed national defense than the one chosen by the national legislature. From this position he would move on to conclude that the availability of this better way rendered unnecessary and *therefore unconstitutional,* the method chosen by Congress.
>
> We do not think the District Judge had any such power, and we agree with his refusal to entertain the

contest presented by appellant. We affirm the judgment of the District Court." Opinion of the Court of Appeals, reproduced in the Appendix to this Petition 16a to 28a, at 23a.[1]

---

[1] There is language in the opinion of the Court of Appeals suggesting that it may have regarded the evidence proffered as insufficient to establish what the defendant claimed it would establish if received and considered:

"But if the evidence proffered to prove unconstitutionality would not in its totality and under a view most favorable to the defendant, prove unconstitutionality, the trial judge does not have to receive it." 17a.

And again:

"There were some stronger expressions of support for an all-voluntary army than what we have set out above. However, appellant's own summing up of the opinions he relies on says '*none* states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost.'" 22a.

On the other hand the Court of Appeals also said:

"Giving this data a view most favorable to appellant's defense, it was to the effect that Congress could have found a better way to raise an admittedly needed Army than the system in force at the time appellant refused to report for induction." 20a.

The evidence that the Court of Appeals refers to as insufficient is that which the defendant was able to present to it in documentary form as exhibits proffered and excluded. These exhibits were summarized in the defendant-appellant's brief to the Court of Appeals. Introducing that summary the defendant-appellant's brief to the Court of Appeals said:

"D. Probable Existence of Facts Claimed.

With the exclusion of the expert testimony and the data subpoenaed from the Department of Defense, the defendant does not claim that the evidence presently before the Court establishes sufficiently the lack of necessity and consequent unconstitutionality of the draft law. However, we believe that the Congressional materials that are before the Court are sufficient to demonstrate that the defendant is not simply shooting in the dark. They seem to demonstrate, indeed, that it is thoroughly reasonable to believe that when the defendant is permitted to obtain and put in his evidence his case will be clearly established."

(Continued on following page)

ARGUMENT.

A. DRAFT CURTAILS FUNDAMENTAL PERSONAL LIBERTIES.

Fundamental to the petitioner's defense is the degree to which the draft curtails the exercise of fundamental liberties. Consider as a checklist the language of *Meyer v. Nebraska*, 262 U. S. 390, 1923, which invalidated a state statute restricting the teaching of foreign languages in public schools. At 362 U. S. 399-400 the Court said:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes liberty guaranteed to the plaintiff in error by this Fourteenth Amendment. 'No state * * * shall deprive any person, of life, liberty, or property without due process of law.' While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those priv-

---

(Continued from preceding page)

It must have been clear to the Court of Appeals that the defendant sought consideration not only of the evidence that he was able to place before the Court of Appeals but also other evidence that the District Court made it impossible for the defendant to present by refusing to hear it even though demanded by subpoena. Moreover, in the third of the statements we quote in this footnote from the Court of Appeals Opinion the Court of Appeals seems to have acknowledged that given a view most favorable to appellant the evidence presented was not insufficient.

We conclude therefore that the judgment of the Court of Appeals affirming the conviction did not rest upon its evaluation of the proffered evidence, but rested solely upon that Court's view of the scope of the District Court's power of judicial review.

ileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Citing cases.]" *Meyer v. Nebraska,* 262 U. S. 390, 399-400, 1923.

Reviewing the liberties thus listed in *Meyer v. Nebraska* it is plain that military conscription under the Selective Service Act impairs them all. It subjects the draftee to bodily restraint, at least in the sense of being minutely subject to command as to where he shall go and what he shall do. It makes it impossible for him to contract effectively for work and wages. It bars him from engaging in any of the common occupations of life. It prevents him from engaging in any program of formal education that he may have chosen as a civilian. He may marry, but he cannot live with his wife and children. He may worship God but not in his home church nor with the guidance and leadership of his chosen religious leaders and companions. And with respect to those other First Amendment rights, freedom of speech and assembly, the draftee obviously cannot be where he would like to be to speak and assemble with others.

B. RATIONAL BASIS IS TEST FOR COMMERCIAL REGULATION.

The Court below did not discuss the fact that this Court has drawn a clear distinction between the scope of judicial review and the test of unconstitutionality applicable, on the one hand, to commercial regulation affecting only the business interests of those subject to the regulation and the scope and test applicable, on the other hand, to enactments affecting fundamental personal liberties.

With respect to commercial regulation affecting only business interests the test applied is whether "the legislators, in light of the facts and testimony before them

have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce." *Katzenbach v. McClung*, 379 U. S. 294, 1964, at 303-304. See also *Nebbia v. New York*, 291 U. S. 502, 1934; *U. S. v. Carolene Products Co.*, 304 U. S. 144, 1938; *Chicago Mercantile Exchange v. Tieken*, 177 F. Supp. 660, 1959.

C. NECESSITY IS TEST FOR LAW THAT STIFLES FUNDAMENTAL PERSONAL LIBERTIES.

In contrast to the rational basis test for the validity of legislation affecting only business or commercial interests of the challenger is the one applicable to legislation that stifles fundamental personal liberties.

An early articulation of the contrast appears in *United States v. Carolene Products Co.*, 304 U. S. 144, 1938. Footnote 4 of that case is appended to a statement of the rational basis test applicable to "regulatory legislation affecting ordinary commercial transactions." 304 U. S. at 152. The footnote begins as follows:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." See *Stromberg v. California*, 283 US 359, 369, 370; *Lovell v. Griffin*, No. 391 this term, decided March 28, 1938 [303 U. S. 444].

Thomas v. Collins, 323 U. S. 516, 1945, drew the contrast most clearly:

> "In short the state would apply a 'rational basis' test, appellant one requiring a showing of 'clear and present danger.' " 323 U. S. at 527-528.

The Court resolved the conflict as follows, 323 U. S. at 529-530:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. Irvington,* 308 US 147; *Cantwell v. Connecticut,* 310 U. S. 296; *Prince v. Massachusetts,* 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *U. S. v. Carolene Products Company,* 304 U. S. 144, 152, 153."

Shelton v. Tucker, 364 U. S. 479, 1960, stated most forcefully the rule applicable to fundamental personal liberties, 364 U. S. at 488:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

The court concluded, 364 U. S. at 490:

> "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers."

Aptheker v. Secretary of State, 378 U. S. 500, 1964, involved the fundamental personal right to travel. Quoting the language from *Shelton v. Tucker* that we have just quoted, the Court held Sec. 6 of the Subversive Activities

Control Act, forbidding a member of the Communist Party to apply for, use, or be issued a passport, to be unconstitutional because it went beyond what was necessary in order to accomplish the legitimate purpose that Congress had in mind.

In further elaboration of the principle we rest upon, the Court in *Aptheker* quoted *NAACP v. Alabama* as follows, 378 U. S. at 508:

> "It is a familiar and basic principle recently reaffirmed in *NAACP v. Alabama*, 377 U. S. 288, 307, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "

On December 11, 1967 this Court decided *U. S. v. Robel*, ____U. S. ____, 88 S. Ct. 419, 18 L. ed. 2d 508, and invalidated the section of the Subversive Activities Control Act which bars members of the Communist Party from employment in defense plants. There, as here, the Act was defended as an exercise of the war power. The Court said, 88 S. Ct. 423-424, 425-426:

> "The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court. However, the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 426. More specifically in this case, the Government asserts that § 5(a)(1)(D) is an 'expres-

sion of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s].' Yet, this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

"When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated. See Schneider v. State of New Jersey, 308 US 147, 161. The Government emphasizes that the purpose of § 5(a)(1)(D) is to reduce the threat of sabotage and espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5(a)(1)(D) put appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatened the security of a defense facility, or giving up his job. When appellee refused to make that choice, he became subject to a possible criminal penalty of five years' imprisonment and a $10,000 fine. The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat

feared by the Government in proscribing it. The inhibiting effect on the exercise of First Amendment rights is clear.

"* * *

"* * * Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. Shelton v. Tucker, supra; cf. United States v. Brown, 381 US 437, 461. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less."

Although this line of cases (except for *Robel*) was presented to the Court of Appeals in the defendant-appellant's brief and argument, that court says:

"* * * We are cited to no case, nor does our research yield a case, that would support the proposition urged on us here, to wit: that a court has the power to review the decisions of the executive and the national legislature as to how to provide for the national defense, because the court thinks that it might be *possible* or *probable* that an all-voluntary army could be obtained by offering more pay and other perquisites to voluntary soldiers."

It is true that we have neither cited nor found a case that *holds* that a court can apply the test of necessity to the draft. But we most vigorously disagree with the Court of Appeals statement that no case has been cited that *supports* that proposition. We submit that the cases cited and quoted above do so. Clearly they hold that when an attempted exercise of government power in other areas broadly stifles fundamental personal liberties the test of necessity must be applied. *Robel* holds that test must be applied even when the power exerted is the war power.

The Court of Appeals relied chiefly on four cases to support its decision.

Arver v. U. S., the *Selective Draft Law Cases*, 245 U. S. 366, 1918, was a war-time decision before the modern doctrine arose that necessity is the test of validity for a law invading fundamental personal liberties. Nevertheless it expressly rested the duty of military service and the right to compel it upon *need*.

Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 1919, involved commercial interests only, and its phrase "unless purely arbitrary" (251 U. S. at 163) expressed the absence of a rational basis.

McCulloch v. Maryland, 4 Wheat. 316, 1819, also was a commercial case, and, of course, antedated the modern rule.

Bertelson v. Cooney, 213 F. 2d 275, 1954, discussed due process only in terms of discrimination. It acknowledged that the power of conscription rests upon necessity. Its declaration that Congress is the sole judge of necessity missed the signposts that should have been seen in *U. S. v. Carolene Products Co.* and *Thomas v. Collins.* That declaration has been blazingly overruled by *Aptheker* and *Robel*, and impliedly overruled by the state action cases, *Shelton v. Tucker* and *NAACP v. Alabama*, all *supra*.

D. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.

Rule 19 of the Supreme Court Rules indicates that certiorari will be granted only where there are special and important reasons therefor. It is indicated that one of the possible reasons for granting certiorari is that a Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

We urge that if our issue is stated broadly this has happened here. Stating it broadly, we would say that the issue is whether a district court has jurisdiction to consider whether the purpose of a Congressional enactment "can be more narrowly achieved" by "less drastic means for achieving the same basic purpose" when the existing enactment "broadly stifle[s] fundamental personal liberties," *Shelton v. Tucker,* 364 U. S. at 488, and deeply "invade[s] the area of protected freedoms," *NAACP v. Alabama,* 377 U. S. 288, at 307.

Stated broadly in this fashion the issue clearly is one that the Court of Appeals has decided in a way in conflict with applicable decisions of this Court.

Another reason for granting certiorari set forth in Rule 19 is that a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

This test is satisfied if the issue of this case is stated narrowly as whether the necessity for the *draft* is reviewable by a federal court because the *draft* broadly stifles fundamental personal liberties and deeply invades the area of protected freedoms.

E. THE NATURE OF THE EVIDENCE.

We do not see the issue now before this Court as one that requires a deep or extensive consideration of the evidence that was presented below. But enough should be said about it in this petition to demonstrate that there is substantial evidence available and that the defendant-petitioner's claim is not a frivolous one.

At the time of the defendant's trial in August, 1966, the evidence available to him was from two sources, the speeches and testimony of a substantial number of Congressmen arguing for abolition of the draft, and testimony

of Assistant Secretary of Defense Robert Morris before the House Committee on Armed Services in June, 1966, disclosing some of the findings of a Defense Department study initiated by order of the President on April 18, 1964. The speeches and testimony of the members of Congress and the testimony of Secretary Morris were offered in evidence at the trial in the District Court, and, of course, were part of the record before the Court of Appeals. They were summarized in detail in the defendant-appellant's brief to the Court of Appeals. We offer here only a statement of the conclusions that may be drawn from this body of evidence.

It is clear that there is a substantial body of opinion among the members of Congress who have studied the draft that it would be highly desirable to abolish it and to rely upon a wholly volunteer force. None of them wants to weaken nor undermine the strength or quality of our national defense in the process, and none states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost.[2]

However, many of them point out that whatever increase in cost there might be in raising salaries in the armed forces to attract more volunteers would be at least partially offset by the economies of reducing turnover and thus reducing training cost, employing civilians or civilian contractors to perform more of the administrative and supply functions, delegating to civilian institutions the teaching of skills needed by the military that have civilian counterparts, and improving the efficiency of military operations in other respects, such as by fitting assignments to abilities more closely.

Many of the members of Congress point out that incentives other than increased pay can also be used to help

---

[2] But see *How to End the Draft, The Case For An All-Volunteer Army,* by Congressmen Stafford, Horton, Schweiker, Shriver, and Whalen, The National Press, Inc., 1967, pp. 113-123.

attract volunteers. Among the suggestions are improved opportunities for education and the learning of job skills before, during and after military service; and improved recruiting and public relations activities.

Many of the Congressmen believe it likely that by combining monetary and non-monetary incentives the increased costs of a wholly voluntary force could be kept within the limit of the savings that it and other economies could bring about, or at least that the net increase in cost would be modest.

Assistant Secretary Morris, presenting the Defense Department viewpoint, concludes in his summary of the Defense Department study that the net increase in cost would range between $4 billion and $17 billion. It is not clear however that this estimate, enormously wide as it ranges, takes into account all of the possible economies that the Congressmen suggest.

Not available for the trial, but presented to the Court of Appeals in the defendant-appellant's brief there was comment by Congressman Curtis upon Assistant Secretary Morris's testimony. Congressman Curtis's comment is found in the February, 1967, issue of *Playboy* magazine on page 168:

> "The Department claims it would cost too much to rely entirely on volunteers. Its latest cost estimates—taken from a report offered by Assistant Defense Secretary Thomas D. Morris at the June draft hearing—range from 4 billion dollars to 17 billion dollars. However, the Department bases its figures, which are almost so vague as to be ridiculous, on its estimates of what it would cost to 'hire' 500,000 new men annually without any other changes in military policies. The Department later wrote me that 'no estimates were made for the draft study of the combined effects of improvement in fringe benefits upon the rate of volunteering * * * since these benefits—

with the exception of training and educational opportunities—were not found to be effective inducements for initial enlistment' (Emphasis added). Thus, the military establishment has erected an artificial monetary barrier to a volunteer Army, for it has failed to consider the large increase in re-enlistments and concomitant savings that would result from improvement in pay and other benefits.

"Bruce Chapman, using 1965 figures leaked from the Pentagon study, has estimated that a pay increase totalling 3 billion dollars would reduce—through higher re-enlistments—the number of new army personnel needed each year from 500,000 to 150,000. Greater fringe benefits and other improvements in military life could bring the number down even further. At the same time, the military would save at least 2.1 billion dollars in annual training costs by retaining the 350,000 men who otherwise would have left after their first hitch.

"Further savings would result from using existing civilian training establishments, including college campuses, vocational schools and on-the-job training programs, to train military personnel. As nearly 90% of the technical skills used by the military are also employed by the civilian economy, military training programs could be reduced to the training of only the 10-20 percent of combat and combat-support jobs (field maintenance, ordnance, battalion-level supply, etc.) that need military, as opposed to vocational, training. The resultant savings for the military could be extensive. Such a program would also be a stimulus to increased business investment in our manpower resources and could produce a greater number of skilled workers for the civilian economy."

Clearly Assistant Secretary Morris's estimates as to the increased costs of a wholly volunteer force cannot be accepted at face value without further examination and cross-examination. The present petitioner was thwarted in

his effort to accomplish such a probing of the findings of the Defense Department study by the refusal of the trial court to permit it either before or at the trial.

The petitioner was further thwarted by the trial court's refusal to permit testimony by a knowledgeable expert. These refusals, on top of the trial court's refusal to receive even the Congressional evidence that is summarized here, completely destroyed the petitioner's opportunity to defend himself against the indictment.

In the next section of this petition we shall demonstrate briefly that precedents overwhelmingly support the proposition that an issue of constitutionality such as we present here, however formidable the task, must be determined on the basis of evidence, when evidence is offered, including, where appropriate, expert testimony, rather than on the basis of the presumption of constitutionality or of the court's generalized knowledge of the American scene.

Although many of the cases we shall cite dealt with matters of commercial regulation for which, as we have seen, the appropriate test is rational basis, the obligation to examine the evidence must be held to be even stronger where, because of the statute's deprivation of fundamental personal liberties, the test of constitutionality is that of necessity, for unless the deprivation of personal liberty is found to be reasonably necessary it denies the substantive due process promised by the Fifth Amendment.

F. THE RIGHT TO PRESENT EVIDENCE OF CONSTITUTIONAL FACTS.

Petitioner's defense is a claim of fact, constitutional or legislative fact rather than adjudicative fact, to be sure, but nevertheless susceptible of proof by evidence. Such evidence, if offered, should be received, and the facts should be found as the basis for the Court's judgment.

The full scope of the doctrine has grown up gradually over several decades. In the summary that follows we approach it chronologically.

1. The Rent Control Cases.

Block v. Hirsh, 256 U. S. 135, 1921, was an eviction suit. The tenant claimed the protection of the District of Columbia rent control law. Justice Holmes held the measure was justified by the war-time emergency conditions. He discussed the fact, apparently on a judicial notice basis, at some length, observing:

> "No doubt it is true that a legislative declaration of facts that are material only as a ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts."

Chastleton Corporation v. Sinclair, 264 U. S. 543, 1924, was a suit to enjoin enforcement of an order reducing the rents for the plaintiff's apartment house. Justice Holmes said, 264 U. S. 547-549:

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. * * *
>
> "* * * In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. * * * Without going beyond the limits of judicial knowledge, we can say at least that the plaintiff's allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end.
>
> "* * * Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the

District than here. The evidence should be preserved, so that, if necessary, it can be considered by this Court."

2. The Shoddy and Bus Franchise Cases.

Weaver v. Palmer Bros., 270 U. S. 402, 1926, was a suit to enjoin enforcement of a Pennsylvania statute forbidding the use of shoddy (reclaimed textile fibers) in the manufacture of bedding and upholstery. Mr. Justice Butler, for the Court, made the following statement, 270 U. S. at 410:

"The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; *but it is always open to interested parties to show that the legislature has transgressed the limits of its power.* Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413. *Invalidity may be shown* by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 64, or *by facts established by evidence.*" (Emphasis added.)

From the evidence the Court concluded that the prohibition of the use of shoddy was unnecessary in order to accomplish the legislative purpose of preventing the spread of infection. Thus the law was invalid and the injunction restraining the enforcement of the law was upheld.

In *City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 1927, a suit to enjoin an enforcement of an ordinance of the city restricting the plaintiff's right to operate its buses on the city streets, the Court directed the District Court to take evidence as a basis for constitutional decision.

3. Whitney v. California.

Whitney v. California, 274 U. S. 357, 1927, sustained a conviction for violation of California's criminal syndicalism act. In a separate concurrence Mr. Justice Brandeis held that a legislative declaration

> "does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. * * * Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied.
>
> "Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the Court or the jury." 374 U. S. 378-379.

4. The Borden and Carolene Cases.

Borden's Farm Products Company, Inc. v. Baldwin, 293 U. S. 194, 1934, sought to enjoin enforcement of the pricing provisions of the New York Milk Control Law. The trial court dismissed the case for failure to state a cause of action but the Supreme Court remanded it for evidence to be taken and the facts to be found. The Court said, 293 U. S. 209-210:

"Respondents invoke the presumption which attaches to the legislative action. *But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such it is a rebuttable presumption.* * * * It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault * * *.

"* * * But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, *these facts are properly the subject of evidence and of findings.* With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, *it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support.*" (Emphasis added.)

U. S. v. Carolene Products Co., 304 U. S. 144, 1938, sustained a Federal statute barring from interstate commerce what were called filled milk products, that is, skimmed milk in which the butter fat was replaced with vegetable fat. The decision was based upon constitutional facts put into evidence in the trial court. Mr. Justice Stone said, 304 U. S. 152-153:

"We may assume for present purposes * * * that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

* * *

"Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing those facts have ceased to exist. *Chastleton Corp. v. Sinclair,* 264 U. S. 543."

5. Smith v. California.

Smith v. California, 361 U. S. 147, 1959, invalidated a Los Angeles ordinance prohibiting possession of obscene matter because it failed to require any scienter on the part of the book seller-defendant as to the contents of the book. In a separate concurrence Mr. Justice Frankfurter urged that in the trial the defendant should have been permitted to introduce expert testimony regarding the prevailing literary and moral community standards. He said, 361 U. S. 165:

"* * * To exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process."

Mr. Justice Harlan in his concurrence agreed with Frankfurter that

"due process * * * requires a state to allow a litigant in some manner to introduce proof"

as to contemporary community standards. But he would not have insisted upon testimony of experts as the only available means of proof. He said, 361 U. S. 172:

"In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence

bearing on community standards. The exclusionary rulings were not limited to offered expert testimony. This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue. On this ground I would reverse the judgment below, and remand the case for a new trial."

6. Discussion.

In this case no court could be expected to have at its fingertips the mass of legislative, historical, and statistical data that the Congressional material shows need to be considered in determining the question of the necessity of the draft. A refusal to consider the evidence is a withdrawal from performance of the judicial function.

We have found helpful thinking on this matter by Professor Dean Alfange, Jr. in his article "The Relevance of Legislative Facts in Constitutional Law," 114 *University of Pennsylvania Law Review* 637, March, 1966. He says at pages 643-644:

"It may readily be granted that questions relative to the wisdom or appropriateness of, or the public interest or public need behind, legislative enactments are usually settled finally by legislative judgment. If questions of constitutional authority are not raised, such legislative facts are not material to the validity of the statute. If the authority to enact a federal law is found within the delegated powers of Congress, and the law cannot reasonably be said to violate any of the constitutional prohibitions on congressional action, it is enough that Congress has seen a need and has acted to meet it. But where the exercise of legislative power approaches a constitutionally prohibited area, as in legislation restricting speech, the question of need becomes crucial, and no sound constitutional judgment can be made except by consideration of legislative facts. A law which appears on its

face or in application to constitute an abridgment of speech—or a prohibition of the free exercise of religion, or denial of the equal protection of the laws by a state, or a state obstruction of interstate commerce, or that has any other effect that the federal or state governments are constitutionally forbidden to achieve —must be justified in terms of an overriding public need relative to the extent of the abridgment. Unless the court is to adopt the absolutist position, and refuse to accept any justification for the law, or to decline to enforce the constitutional prohibition by adopting the position of self-restraint and accepting any superficially plausible justification, it must examine the sufficiency of the justification put forward. This may perhaps be described as questioning the judgment of the legislature as to the wisdom or appropriateness of the legislature's enactments, but it is nonetheless an unavoidable exercise of the court's political responsibility.

"Doubtful constitutional questions can never be answered entirely irrespective of legislative considerations of public need."

At page 648 of his article Professor Alfange presents the following discussion:

"It must be granted that constitutional arguments based on necessity may be open to suspicion. Mr. Justice Jackson, in rejecting the government's contention in the steel seizure case of 1952, thus commented: 'The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.' Because of its ready availability to totalitarian regimes to justify abandonment of the rule of law, the idea that 'necessity knows no law' excites a natural abhorrence. But one need not accept all implications of this idea—although it is certainly true that as necessity becomes increasingly desperate for individuals or nations it becomes

increasingly unrealistic to expect strict observance of settled legal rules, a fact that Mr. Justice Jackson expressly recognized elsewhere. What must be conceded is that law must be kept abreast of social necessity, and that just as Congress has the responsibility of keeping statutory rules in line with current social needs, the Supreme Court has the responsibility of insuring that the Constitution does not become an insurmountable barrier to the accomplishment of valid and essential national goals."

We suggest that in spite of its abhorrent extension of governmental power over the lives of our citizens,[3] the draft has been accepted as constitutionally valid in the past because of the feeling that the courts have shared with Congress and the people that conscription was necessary to national survival. Certainly this was the feeling that sustained conscription during the Civil War, and World Wars I and II. And peacetime conscription since World War II undoubtedly was supported by a similar feeling amidst the tensions of the cold war, though it has not existed without dissent, as Congressman Curtis manifests.

But it is necessary to be on guard lest old assumptions keep us from examining new facts. The Congressional materials presented in this case argue repeatedly that the changing technology of warfare made the peacetime conscription of 1964 inefficient, wasteful, ineffective for defense purposes, and—the crucial constitutional fact—unnecessary.

A law valid at one time may cease to be valid when the facts change. *Chastleton Corp. v. Sinclair,* 264 U. S. at 547, 1924. *Kress, Dunlap & Lane, Inc. v. Downing,* 286 F.2d 212, 1960.

---

[3] See Jean Carper, *Bitter Greetings,* Grossman Publishers, 1967.

So far as we have been able to find no court has ever been presented, except in this case, with a thorough factual challenge to the necessity of the peacetime draft. Perhaps no such challenge as we make here could have been made much earlier than this. Perhaps it is only with recent technology and population growth that the challenge has become possible. Moreover, so far as we know, it is only the work of the members of Congress that has made readily available the factual data necessary for evaluating the challenge. The product of that work is what we are presenting to this Court. Thus the fact that the draft law has not already been overthrown should not bar its validity from being seriously considered in this case.

G. SUBSIDIARY ISSUES.

Presented in the courts below and fairly comprised within the questions that this petition brings to this Court were several subsidiary issues which the Court of Appeals did not discuss in its opinion and which we therefore deem it unnecessary to present in detail to this Court now. However, if this petition is granted and the case is remanded for trial on the evidence, it may be that the trial court should be instructed by this Court as to the admissibility of the several kinds of evidence that were offered below and as to the right of the defendant to ascertain by subpoena in advance of trial what evidence is available in the hands of the government. These matters involve questions of governmental privilege, appropriateness of expert testimony, judicial notice of the Congressional materials, and the applicability of rules 17(c) and 16(b) of the Federal Rules of Criminal Procedure.

Unless this Court directs otherwise in granting this petition for certiorari these matters will be presented in our brief on the merits.

CONCLUSION.

The defendant-appellant says he is not guilty because the Selective Service Act which he is held to have violated is unconstitutional. It is unconstitutional, he says, because at the time of his failure to report for induction conscription was not reasonably necessary as a means of raising an army or providing for the national defense. Because conscription under the Selective Service Act deeply impairs and inhibits exercise of fundamental personal liberties guaranteed by the first Ten Amendments of the United States Constitution it can be permitted under the substantive requirements of the due process clause of the Fifth Amendment only if it is reasonably necessary. It is not sufficient to sustain it that there may be a rational basis for the Act.

The petitioner offered evidence that in 1964 conscription was unnecessary since armed forces of equal effectiveness could have been provided by wholly voluntary means. This evidence was totally excluded by the trial court, and the exclusion was affirmed by the Court of Appeals on the ground that a District Court does not have jurisdiction to provide judicial review of the Congressional determination that the draft was necessary. This holding was an abdication of the judicial function and a denial of procedural due process to which the defendant-petitioner was entitled, a complete exclusion of the defense that he sought to make to his criminal indictment.

Stated narrowly, the question is one which has not been settled by this Court but should be. Stated broadly, the question decided by the Court of Appeals was decided there in conflict with applicable decisions of this Court. In a procedural sense the courts below have so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision.

The petition for certiorari should be granted.

Respectfully submitted,

RALPH RUDD,
Attorney for the Petitioner.

RUDD, OBER & MILLER,
Of Counsel.

APPENDIX.

(171) ORAL OPINION OF DISTRICT COURT.

(Rendered September 1, 1966.)

We have here an indictment on the part of the Government against Donald Smeltz Butler in which the Grand Jury charges that on or about February 4, 1964, in the Northern District of Ohio, Eastern Division, Donald Smeltz Butler, a person required and ordered to serve in the Armed Forces of the United States under the Universal Military Training and Service Act, as amended, did knowingly fail to report for induction into the Armed Forces of the United States after being so ordered by Local Board (172) No. 11, Carrollton, Ohio, in violation of Title 50 Appendix, Sections 456, 462, United States Code.

From the evidence, it appears to me that this Defendant enjoys a rather splendid job which is, to some degree, under Government auspices, and which is as closely related to the country's defense as any job could very well be. He profits daily by such employment.

He does not have the objection to military service which is so often raised before our courts, namely, that such employment by him would save someone else for military duty. Religion does not enter into his objection in any way. As he has said in writing, he has no complaint with reference to any of the processes under the Selective Service Act, except that he questions the Government's right, under this law, to draft him into military service, claiming such law to be unconstitutional.

For many years, he took every possible advantage of those provisions of the Act which granted him deferments from military service. For years, he used one ground or another to defer and to delay service, until he has attained (173) the age of 26. During these eight years, he never raised a question about his coming under the Act or

about the unconstitutionality of the Act. He never questioned any legal authority of the Selective Service over him: he merely advanced his many claims over this eight-year period to the effect that his military service ought to be deferred until his education would become more complete.

During this time, he got more and more education, and he took a lot of time to get it. He also worked at this Government job. Apparently he was skilled in research pertaining to molecular functions with reference to rockets, space craft, et cetera, from a scientific viewpoint.

During these eight years in which he sought and obtained these many deferments, he was very polite and courteous with all the representatives of the Selective Service agency of Government, and they were most deferential, to say the least, with him.

As a coincidence,—it really appears as if when he reached the age of 26, that magic age beyond which inductions are less frequent (174) as a matter of policy, but not as a matter of law, his personality seemed to undergo a very sudden and rather complete change. All his politeness came to an end. In his writings, he suddenly became very bold and contemptuous, both toward the Selective Service System and to the country itself. On January 12th he starts to explain—it is one of the exhibits here—he writes to the board and says: "You probably have assumed that I would support the Selective Service System if I were called upon to do so. It is true that I have never indicated otherwise. For this deception I am truly sorry; for if called upon *I would not* comply with the wishes of the Selective Service System."

This becomes a sort of a declaration of independence on his part. The next paragraph relates:

"I have not for a long time agreed with the principle

of involuntary military service and that is still my feeling. That you have not known this is my fault. It was at my consent and planning that this deception existed. This deceptive planning, I am ashamed to say, even extended as far as to my purposely obtaining a (175) low score on the Cleveland tests. I am a draft dodger, of that I am proud, that I did not make it known, that only do I regret."

Of course, I don't think he regretted it with sincerity. I think he did not make it known because he knew very well that if he had made it known, he would have been inducted into the service. So, as I say, he writes a letter really to express his contempt for the Government and the country. Continuing:

"My disagreement with involuntary service is not made on any religious basis. It is based on a love of freedom and a hatred of dictatorship. And my belief is strengthened as the dictatorship is strengthened. So when a dictatorship is so powerful as to decree the life and death of thousands,—rather millions of people it has truly earned my disgust."

Now in reading this letter, the Court asks itself, "Well, is he calling us a dictatorship?" And the next paragraph helps to decide:

"Our military has this power and it has my disgust. But our military has not ended its dictatorship at choosing the life and death of people; it has, in the Selective Service (176) System the legal power of assigning the executioners. And they dictate the terms under which one may be spared this fate. It is a complete dictatorship for those under its domination. For this reason I refuse to accept such domination."

So what he is saying is: our country is a dictatorship and the Selective Service is part of a dictatorship, that is why he refuses to accept the domination of such a terrible dictatorship. Continuing:

"There are, of course, many undesirable dictates of the Selective Service. That the Selective Service should have the power to influence marriages, families, and occupations is unreasonable."

Of course, one cannot help but make the observation that it has not interfered with him in any of those respects. And continuing:

"But that it also has the power over who shall kill and be killed is unjust.

"Now I realize that military service, voluntary or involuntary, does not necessarily call for killing. However *any military service does support killing.*

"And, it would seem that to have a person (177) killed, or to help in such an act, one should know just what is being lost with that life. But * * * I do not believe that I can judge the value of a human life. I do not believe that any military officer can evaluate a life's worth, and I do not believe that you—" meaning the Selective Service—"—are capable of such a judgment. And without such a judgment killing can only be done blindly. Killing blindly under orders then is something I cannot do as long as I believe in freedom. And I do believe strongly in freedom. If my death would help the cause of freedom I would gladly forfeit my life. But to kill is of itself a defeat of this cause.

"Therefore before I could support any killing a cause more important to me than the cause of freedom must be presented.

"Is patriotism such a cause?

"Let me say that it is not a good country because I was born here * * * It's a good country because I like it and it's a bad country because I dislike it. My patriotism is based on my belief and my belief is in freedom.

"Benjamin Franklin once said, 'Where liberty (178) dwells—there is my country.' "

So I cannot help but note that a country is good because this Defendant likes it,—and it has been very good to him: he has avoided service all these years; he has this splendid job, a fine position. For eight years, he has gotten out of duty imposed on so many others—many of whom are now dead. But it's a good country if he likes it; that is how he defines it. If he doesn't like it, then it isn't a good country. That is what he thinks of the country which has done so much for him.

Now, he goes on with another question:

"Are all the lives of the men who fought and died in World Wars I and II wasted because I will not follow their example?

"No * * * World Wars I and II were not wasted wars * * * those were not wasted lives *if* we learned something about that experience. But we would be wasting those lives if we should *only* repeat their actions and *not* attempt a better way of life.

"Will the label of coward turn me from my belief in freedom? If it takes a brave man to kill another, then I am a coward.

(179) "No, these causes will not sway my belief; so it is that I have no reason to agree with the Selective Service System, much less to comply with it. For as certainly as a strong America is a great ideal, a free America is a greater ideal."

Now, that letter was on January 12, 1963. Within a week, meaning January 17, 1963, he comes through with another:

"Betty—" he knows somebody in the Selective Service so well he calls her by her first name:

"First of all, I'm sorry I haven't sent you any word since you sent the last form to me."

He wants to be polite to her.

"Enclosed is a copy of the letter that I have sent to the draft board." Meaning the letter I just read.

"A letter like this is hard to write, perhaps harder yet to send.

"This letter will also explain why no form is enclosed with this reply.

"One item you may wonder about in this letter is the mention of a planned low scoring on the tests taken in Cleveland. I would have mentioned **(180)** this to you in December when we spoke, but truthfully I had forgotten about it."

Of course, truthfully, he hadn't passed his 26th birthday. Continuing:

"However, I couldn't help but feel your opinion of my truthfulness was undeserved on my part, but it wasn't until later that I remembered why.

"To make this clear, I am referring to the written tests given at the Cleveland physical. For someone who has spend the previous 15 years taking many various tests, the Cleveland tests were quite simple. Simple enough to not only find the correct answers but also to find reasonable sounding wrong answers. Therefore it was also quite easy to miss approximately one-third of the answers and to obtain a low score."

Really, here, he is bragging to Betty how dumb a man, as smart as he, could make himself appear to be. Continuing:

"This I did in the earnest hope of avoiding any influence of the Selective Service. And I was almost successful in this venture, as out of all the men there that day only five were left as possibly unfit. I was one of those **(181)** five * * * three of which *were rejected.* So you see, my deception was not only intended but almost effective. I am thankful now that I did not evade the Selective

Service on such devious terms. I doubt that I could long have been silent had I been successful. The reason for this I think you will find in the following letter."

Later, on October 31, 1963, in a form sent to him by the board, there is a paragraph which mentions to him his duty under the Selective Service, and the paragraph reads as follows:

"This questionnaire is provided as a convenience in performing—" and this is underlined—"—your continuing duty under the selective service law,"—that is the end of the underlining—"—to report changes in your status and mailing address to your local board. It is particularly desired that current information be presented—" this is underlined, now—"*promptly*,"—end of the underline—"—regarding the subject matter of any series of this questionnaire which may be checked. You may attach any additional information you believe should be brought to the attention of the local (182) board." And aside of this, he has written, "I have no such duty. D.B."

In other words, now they're safe, become real bright, bold, independent and contemptuous. Now they're safe.

This was his first indication to the Selective Service —after they gave him these many deferments for an eight-year period to the age of 26—first indication that his politeness was mere hypocrisy all this time.

Here he denies any duty, meaning any responsibility to the Board or the Government at all. And before me, he defends it all upon the claim that there is a lack of constitutionality in the legislation.

Of course, on the subject, there hasn't been a single case presented to me to that effect. So it does appear to me as if he thought, once he got past 26, that it was then safe for him to be less polite and gracious with the Selective Service than he had been. In actuality, he attacks the

authority from which he asked and received eight years of deferments.

Now, of course, we have heard him testify; had an opportunity of some observation of him (183) and a chance to see how bright he is. One cannot help but think, and believe, that he is surely bright enough to know that, with all his great intellectual attainment, no one would ever put a rifle and a bayonet in his hands. He is bright enough to know that the greatest probability—had he been called upon to serve, one of his capacity, history and occupation—would have been assigned where those capacities would have been utilized. He surely knew nobody would ever ask him to kill. But he decided to make a great big story out of the fact that he wouldn't want to hurt anybody.

My question is: did he hurt the country by violating this law? It looks to me as if he laid low for eight years; and then after he attained this magic age, he wrote this letter to the board, telling them of his hypocritical deception—

Mr. Rudd: Your Honor please,—

The Court: Be seated.

Mr. Rudd: I think your Honor is in misapprehension about some of the facts.

The Court: Be seated.

Mr. Rudd: Your Honor, I would (184) like to correct that.

The Court: You have had your say, and I have been patient with you for hours.

When a man says that he is proud he is a draft dodger in a letter to the Selective Service, then the one who is to judge his case—which, in this instance, is myself—must later very seriously consider whether his own evaluation of himself was not a true self-appraisal.

He calls himself a draft dodger—and he is proud of it. I have to call him the same thing—and I am ashamed to

have to call it to him—that a man with all his capacity would take advantage of the country, which he has done.

From his writings, he says he loves freedom, of which he has been the beneficiary these last ten years, largely because others who love freedom were willing to fight for it. They went to fight for his freedom.

From his writings, he says he hates the dictatorships which endanger our country, and which are held at bay by others who also hate dictatorships to the point where they are willing to fight against dictatorships to protect (185) against these dictatorships. But he really classes our country as a dictatorship, also.

He talks about World Wars I and II. In World War I, we lost 75,000 men in France: to stop a dictatorship.

In World War II, we lost 400,000 men: to stop a dictatorship. He calls us a dictatorship.

My question is: did he fail and refuse to report for induction? He says he did. On paper, he says he won't go. On some paper, he says he fooled people by taking deceptive tests. In other words, he lied in his answers, and bragged to this girl in the Selective Service about how he nearly fooled somebody; except that he was so smart, he really couldn't fool them. He really couldn't make them feel he was dumb because he was so bright—and apparently he is, in some sort of a way.

So I have to find he did fail and refuse to report for induction.

All I could see here is that this draft board was a lot more kindly and solicitous of him than has been the case in any one of these matters I have ever seen. I have never seen a case, in my 12 years in this building, where (186) any draft board was so solicitous over a man trying to get ahead, who really didn't need any more than he had. But he was always working for a degree, and he was always taking his time about getting it for fear he would get it

too fast; for fear he would get it before he was 26. So the board was most kind to him—and none of their kindness was appreciated or understood.

Here he deliberately refrained from going to the board to report for induction. The board was very meticulous about making sure he got his notice in the right way; because after they found out his real nature, they wanted to be meticulous about conforming with the law. He denies none of this. He just said, "Oh, the law is no good. It's against the United States Constitution."

So my first question is: did he fail to report, knowingly fail to report?

There isn't any question about that. He says so; and all the evidence is that he so failed. I doubt that there was ever a case in which knowledge was any better proved: he knew about his right to appeal classifications every time he received them, but he never chose to (187) appeal. He never appealed his I-A classification at any time; there wouldn't be any ground on which he could. He never claimed any unfairness to him administratively by the Selective Service Board rulings. He just let eight years go by during which he was learning German and a few other subjects, and taking his time about it until he hit the safe age of 26.

Now he falls back on the defense that the law is not constitutional. On that subject, he offers no decisions, no cases, no law, no authority whatsoever. The only proof his eminent counsel offers is the suggestion that other men in Congress, or otherwise, have declared themselves as either having a similar opinion or as having an opposition to the law. That is not proof in a courtroom. His eminent counsel has here offered no legal proof on this subject, except apparently that the wish is father to the thought. He does hope that some other court, some other day, will find that the Selective Service Act does deprive draftees

of their constitutional rights. He has a right to entertain the hope and to try to prove it. But, here, he offers not one decision of any court (188) anywhere in America. Of course, there isn't any.

I herein find that the Selective Service Act has not in any way deprived this gentleman of any of his constitutional rights, and I am constrained to find that he is herein guilty of the charge.

I will refer the matter to the Probation Department for a report; and I will ask his counsel, since the Probation Department has no representative here, to take his client upstairs and get started on such a report. To all of which, this Defendant has his objection and exception.

We will now adjourn until 2:00 o'clock this afternoon.

Mr. Rudd: Your Honor, there is a serious misapprehension with respect to the facts. I am afraid we will—

The Court: Let's stop right there and take your objection, and that will be that.

We will take our adjournment until 2:00 o'clock, Mr. Rogers.

(Thereupon Court was adjourned.)

(The following was dictated to the Reporter, (189) in the presence of Mr. Oakar, after the Court had left the bench:

Mr. Rudd: Mr. Reporter, let the record show that the Judge has left the bench, but that he advised me to state for the record what I conceive to be a misapprehension on his part with respect to the facts of the case, and that I now do.

The Judge stated that the letter from which he read, bearing the date of January 12, 1963, but received by the local board on January 21, 1964, as shown by the stamp that appears on the face of the letter, was written after the Defendant reached the age of 26. In this, there is a serious

misapprehension, because the Defendant was, at that date, only 25 years old.

Page 1 of the classification Questionnaire, Selective Service Form 100, as it appears in the file in evidence in this case, states his date of birth as March 29, 1938. I will point out that, no error with respect to that date having been suggested in the record, it must, therefore, be accepted as true.

Therefore, he would not have become 26 **(190)** until March 29, 1964, more than two months after this letter was received by the local board.

If my memory serves me correctly, he did testify that the date "January 12, 1963," as written on his letter, was in error, and that he meant "January 12, 1964," that being the date on which he drafted the letter; and he mailed it some days later, as shown by the date on which it was received by the local board. Thus, he was still short of age 26 by more than two months, and was not in any sense seeking to boast of or to crow to the board in triumph at having evaded service past the age of 26. He was, in fact, deliberately disclosing his attitude toward the draft and the mistake that he felt he had made in seeking to evade it by what he recognized, when he wrote the letter, as dishonest means; and was doing this at that time when he well knew, from the fact that he had received the Questionnaire, which he failed to return and which he mentioned in his letter, that he was subject to an order to report for induction.

One other minor misapprehension of the facts remains, and that relates to the marginal **(191)** note which the Judge said was later, that is, after the letter received by the board on January 21, 1964. In fact, that marginal note was returned on a Questionnaire that was mailed to him on October 31, 1963 and was received back by the

board on November 12, 1963, that being exactly two months before the date on which he wrote the letter the board received on January 21, 1964.)

* * * * *

TRANSCRIPT OF SENTENCING.

(1) The Court: Good morning, Mr. Rudd.

Mr. Rudd: Good morning.

The Court: I wish to explain something to you before I put the question to this young man. Back at the time when he was convicted for being unwilling to submit himself to the draft, we had a hearing for some days and I made a comment at the conclusion of the case to the effect that in this letter, which (2) he sent to the Draft Board saying that he was a draft dodger and proud of it, I made the remark that he sent it after he became 26 and when he felt safe. I was wrong in my date. He had sent it a couple weeks ahead of that, or a few weeks, maybe a month. But, of course, it makes no difference to the ultimate question of whether he is guilty or not of being a draft dodger.

Now, I am in the position where I must ask him and yourself, as counsel, whether he has anything to say as to why he should not be sentenced this morning for refusal to submit himself to the law with reference to the draft.

Do you have something to say on that, sir? You may say it.

The Defendant: Yes, your Honor, I have. What I would like to say is precisely the same argument that I held I was not guilty for the simple fact that I don't feel we have had a chance to present a very good case up to this point.

The Court: You had days in which to present it, sir.

The Defendant: I would like to say something at this time, if I may.

(3) The Court: I am asking you to tell me anything you can tell me as to why you shouldn't be sentenced this morning.

The Defendant: I honestly feel that the law I broke was unconstitutional and, therefore, not a law of this land. And as far as I am concerned, this is still true.

The Court: As far as you are concerned what?

The Defendant: As far as I am concerned this is still true. To me this case was simply a matter of conscription vs. freedom as guaranteed in the constitution. And I still believe in freedom and I still believe it is constitutional, and I don't believe Selective Service is.

The Court: We all believe in freedom, but the reason we have it, is because somebody else did submit themselves to the draft.

You are sentenced to the custody of the Attorney General for five years. That is all.

The Defendant: May I say something more?

The Court: I don't want to hear any more. You had your chance to talk, and you had it for days before.

(4) The Defendant: May I say something more?

The Court: What else do you want to say?

The Defendant: I would like to give you my argument.

The Court: I don't want an argument. I want to know why you shouldn't be sentenced. All you wish to discuss is your claim that the law is unconstitutional.

The Defendant: Are you going to give me a chance?

The Court: I don't want to hear any more about what is wrong with our law. I would add to what I just said, that this young man occupies a splendid job, really in

Government service, and I think he is wholly unappreciative both of the service and the country.

We will take our adjournment.

JUDGMENT AND COMMITMENT.

(Filed October 12, 1966.)

On this 7th day of October, 1966 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon a finding of guilty by the Court after trial of the offense of having knowingly failed to report for induction into the Armed Forces of the United States after being so ordered by Local Board No. 11, Carrollton, Ohio, in violation of Title 50 Appendix, Section 456, 462, United States Code, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JAMES C. CONNELL, *Chief,*
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided February 8, 1968.)

Before O'SULLIVAN, PHILLIPS, and CELEBREZZE, Circuit Judges.

O'SULLIVAN, Circuit Judge. Appellant was sentenced to five years imprisonment for knowingly failing to report for induction into the armed forces, in violation of Title 50, U.S.C., App. §§ 456 and 462. No claim is made of any administrative unfairness or lack of procedural due process in the Selective Service Board's rulings. Appellant admits he knowingly failed to report, and defends solely on the ground that at the time he was ordered to report for induction (February 4, 1964) the draft law was unconstitutional in that it would have deprived him of his liberty and perhaps of his life without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. This is so, he says, because the Congressional purpose to provide for the common defense *could have been* accomplished by less drastic means than conscription if incentives for voluntary enlistment had been improved, chiefly by increased pay and opportunities for training.

A Judge of the United States District Court for the Northern District of Ohio, Eastern Division, to whom the case was tried, rejected the defendant's constitutional defense and his evidence bearing on alternatives to the draft, including speeches of members of Congress, a study by the Defense Department of the draft selection system, the expert testimony of an economist, and testimony by an Assistant Secretary of Defense before the House Committee on Armed Services. All of this, appellant asserted, would demonstrate that the manpower needs of the United States could have been satisfied by a wholly voluntary system

on the date in question, February 4, 1964. The remedy sought is for the case to be remanded to the trial court for a new trial, with direction to permit the defendant to subpoena in advance of trial relevant studies in the hands of the government and to place in evidence data bearing on the issue of the necessity for the draft. The trial judge would then, upon his evaluation of the evidence, determine whether or not conscription was reasonably necessary at the time of the defendant's alleged offense, and if not, would acquit the defendant on the ground that such lack of necessity rendered the draft law unconstitutional.

Appearing as amicus curiae, the American Civil Liberties Union urges on behalf of appellant that he should have "the right to attempt to prove unconstitutionality." On page 2 of its brief it is stated:

> "Amicus takes no position on the merits of the constitutional argument. We do not argue that the draft, on February 4, 1964, or on any other day, was constitutional or unconstitutional. * * *
>
> "Amicus does urge, however, that appellant should have had the right to challenge its constitutionality, which right was denied by the trial court's action in quashing subpoenas, denying motions for subpoenas, and refusing to hear relevant testimony in support of the claim of unconstitutionality. Accordingly, amicus' position here is essentially procedural."

We could agree that a litigant charged with disobedience of a Congressional Act should have "the right to attempt to prove unconstitutionality" of the Act in question. But if the evidence proffered to prove unconstitutionality would not in its totality and under a view most favorable to the defendant, prove unconstitutionality, the trial judge does not have to receive it. Appellant claims no other support for his challenge to the constitutionality of the draft

law than the asserted fact that on February 4, 1964, the day he refused to report for induction, the national defense could as well, or better, have been served by an army made up of volunteers, attracted to military service by better pay and better living conditions. He argues that had this system of providing for the national defense been in effect on or before the day appellant refused induction, February 4, 1964, there would have been no need to draft appellant Butler—therefore, to do so was an unconstitutional deprivation of his liberty. Stated in the language of appellant's statement of questions involved, his position is:

> "*The claim of lack of necessity* is founded on the proposition that at the time the defendant was ordered to be inducted, February 4, 1964, the military manpower procured by the draft *could have been* procured by voluntary means if incentives for enlistment had been improved, in the form chiefly of higher pay and better opportunities for training and education." (Emphasis added.)

In its amicus brief, the American Civil Liberties Union states the question as follows:

> "Is compulsory military service such a deprivation of individual liberty that the constitutional guarantee of due process under the Fifth Amendment *must permit a defendant who refuses to submit to induction to challenge the constitutional validity of the induction order on the grounds that at the time he refused to submit there was no overriding need of national security which could not be satisfied through less onerous means?*" (Emphasis added.)

Appellant does not claim that an army of the size then under arms was not necessary for the national defense on February 4, 1964, the day of his alleged offense. The army was brought into being by voluntary enlistments, and by

employment of the Universal Military Training and Service Act. The charge is that Congress should not have adopted conscription as one of the means of maintaining the needed army; it is not claimed that voluntary enlistments under the system then in force did provide, or could have provided, such an army. In his brief's address to us, appellant makes clear his position as follows:

> "First of all we must make it clear that *it is not suggested that the military forces of the United States were not needed or should have been smaller, less well trained, or less effective than they were in the period of the defendant-appellant's refusal of induction.* Indeed what is sought to be proved is that by improved pay and other incentives and by certain reasonable adjustments of organization, armed forces fully voluntary but at least equally effective and probably better trained and more efficient could have been provided. And if Congress had determined to preserve the Selective Service System as a stand-by mechanism for rapid increase of military manpower in event of necessity, that would not militate against the appellant's defense." (Emphasis added.)

At another place, the appellant states his position in this way:

> "*Appellant does not question the existence of the power to conscript when it is necessary.* We question only whether it was necessary at the time of the defendant-appellant's alleged violation of the Act." (Emphasis added.)

And in its amicus brief, the ACLU quotes from its January 30, 1966, statement of policy on "Military Conscription":

> "How can this statement of position be applied realistically in the context of the present draft system? *At the moment we see no constitutional, legal challenge*

that can be brought against conscription per se or the monthly drafts calls, but it is possible that an individual case may arise which might bring a civil liberties issue into focus. The major thrust, therefore *must come in the legislative forum,* an appropriate arena for debate on the need for a particular conscription."

We have read the appellant's exposition of the content of his proffered evidence. It consisted in the main of various statements by members of Congress, some excerpts from reports of studies made by the Department of Defense, and evidence that would have been given by an expert witness. Giving this data a view most favorable to appellant's defense, it was to the effect that Congress could have found a better way to raise an admittedly needed army than the system in force at the time appellant refused to report for induction. The Appellant's brief summarizes his proffered evidence as follows:

"It is clear that there is a substantial body of opinion among the members of Congress who have studied the draft that it would be highly desirable to abolish it and to rely upon a wholly volunteer force. None of them wants to weaken nor undermine the strength or quality of our national defense in the process, *and none states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost.* (Emphasis added.)

"However, many of them point out that whatever increase in cost there might be in raising salaries in the armed forces to attract more volunteers would be at least partially offset by the economies of reducing turnover and thus reducing training cost, employing civilians or civilian contractors to perform more of the administrative and supply functions, delegating to civilian institutions the teaching of skills needed by the military that have civilian counterparts, and improving the efficiency of military operations in other

respects, such as by fitting assignments to abilities more closely.

"Many of the members of Congress point out that incentives other than increased pay can also be used to help attract volunteers. Among the suggestions are improved opportunities for education and the learning of job skills before, during and after military service; and improved recruiting and public relations activities.

"Many of the Congressmen believe it likely that by combining monetary and non-monetary incentives the increased costs of a wholly voluntary force could be kept within the limit of the savings that it and other economies could bring about, or at least that the net increase in cost would be modest."

The *better* alternative to the draft would consist primarily in raising the pay of the soldiers. One of the quoted Congressmen stated:

"Improvement in salary, living conditions, training, retirement benefits, opportunities for travel, and social status would make military service more attractive. It is clear that *at some level of expenditure* the armed services can attract all the men with the skills they need to keep our fighting machine in top shape. *The cost is not clear.*" (Emphasis added.)

Another of the Congressmen, advocating that one day we might get along with a totally voluntary system, said:

"During the Vietnam conflict a voluntary system is not feasible but we can pursue the goal."

To like effect, another stated, on June 28, 1966:

"We are now in an international crisis. No doubt the status of our existing military forces requires the draft."

A report of an Assistant Secretary of Defense on a study of the draft undertaken by the Department of Defense in April, 1964, contained the following:

> "A major objective of the study was to assess the possibility of meeting our military manpower requirements on an entirely voluntary basis in the coming decade.
>
> * * *
>
> "We found that elimination of the draft with no new incentives would make it impossible to sustain force levels of the size required *during the past sixteen years.*
>
> "The cost of sustaining an adequate all volunteer force would be prohibitive. The responses of the 16 to 19 year old group reveal that without a draft equal pay would be an adequate incentive to induce enlistment for only 4%. Considerably higher pay than in civilian life would induce enlistment by another 17%.
>
> * * * * *
>
> "In summary, it is *theoretically* possible to 'buy' an all-voluntary force at a cost ranging up to $17 billion, *depending upon unemployment conditions.* Other changes and techniques do not appear collectively to be able to meet the deficit anticipated under an all-voluntary force." (Emphasis added.)

There were some stronger expressions of support for an all-voluntary army than what we have set out above. However, appellant's own summing up of the opinions he relies on says, "*none* states a firm conclusion that the draft can be abolished and a wholly volunteer force can be maintained at reasonable cost."

Arrayed against this evidence which appellant proffered, is the statutory declaration by the Congress that "an adequate armed strength must be achieved and maintained to insure the security of this nation," and that:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." Title 50, U.S.C., App. § 451(c).

Congress then goes on to implement its declaration of need and purpose by enacting provisions for the draft as "a system of selection which is fair and just." The entirety of the provisions of the Universal Military Training and Service Act, 50 App. U.S.C. § 451, et seq, are but Congressional expression of its legislative judgment as to the need for the law it enacted.

We read, then, appellant's position to be that an issue of fact should be framed between his proffered evidence and the judgment of the Congress as to the necessity of the draft; this issue would then be submitted to a United States District Judge; the District Judge would have the power, upon his own evaluation of the evidence, to conclude that there was a better method of providing for the needed national defense than the one chosen by the national legislature. From this position he would move on to conclude that the availability of this better way rendered unnecessary and *therefore unconstitutional*, the method chosen by Congress.

We do not think the District Judge had any such power, and we agree with his refusal to entertain the contest presented by appellant. We affirm the judgment of the District Court.

We think that our conclusion so easily emerges from the foregoing recital that it requires little support from fresh dissertation and repetition of familiar law. We may concede that the Supreme Court has said that the war powers of Congress must be exercised within "Constitu-

tional limitations." *Hamilton v. Kentucky Distilleries & Warehouse Company,* 251 U.S. 146, 156, 64 L. Ed. 194, 199 (1919); *Galvan v. Press,* 347 U.S. 522, 530, 98 L. Ed. 911, 921 (1954). We observe that in *Galvan* the assertion of judicial power to control Congress' exercise of its war powers was dictum and in *Kentucky Distilleries,* the Supreme Court found no fault in the Congressional action there involved. We are cited to no case, nor does our research yield a case, that would support the proposition urged on us here, to wit: that a court has the power to review the decisions of the executive and the national legislature as to how to provide for the national defense, because the court thinks that it might be *possible* or *probable* that an all-voluntary army could be obtained by offering more pay and other perquisites to voluntary soldiers.

We think it sufficient to cite and quote from the following authorities: In the *Selective Draft Law Cases,* 245 U.S. 366, 62 L. Ed. 349 (1918), the Court, in holding conscription a valid exercise of Congressional power, said:

> "The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power 'to declare war, * * * to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; * * * to make rules for the government and regulation of the land and naval forces.' Article I, § 8. And, of course, the powers conferred by these provisions, like all other powers given, carry with them as provided by the Constitution the authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' Article I, § 8." 245 U.S. at 377, 62 L. Ed. 353.

It is suggested by appellant that even though the Act now challenged was constitutional when enacted, the

District Judge could, upon the evidence we have reviewed above, determine that its constitutional validity did not remain to the date of appellant's disobedience of it. A like contention was made in the *Kentucky Distilleries* case. The Court replied:

> "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress. (citations omitted) Nor may the court inquire into the wisdom of the legislation. (citations omitted) *Nor may it pass upon the necessity for the exercise of a power possessed,* since the possible abuse of power is not an argument against its existence. *Lottery Case, Champion v. Ames,* 188 U.S. 321, 363." 251 U.S. at 161-62, 64 L. Ed. 202.

The Court then explained *Perrin v. United States,* 232 U.S. 478, 486, and *Johnson v. Gearlds,* 234 U.S. 422, 446, cases which had conceded arguendo that valid Acts of Congress may become invalid after enactment due to changed circumstances. Noting that the Acts were in both instances upheld, the Court said that "In each case the decision rested upon the ground that the question of what was reasonably essential * * * was one primarily for the consideration of the law-making body; that Congress was invested with a wide discretion; and that its action, unless purely arbitrary, must be accepted and given full effect by the courts." 251 U.S. at 163, 64 L. Ed. 202. It went on to say:

> "Conceding, then, for the purposes of the present case, that the question of the continued validity of the War Prohibition Act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that, *on obvious grounds, every reasonable intend-*

> *ment must be made in favor of its continuing validity, * * * that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded;* and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued." (Emphasis added.) 251 U.S. at 163, 64 L. Ed. at 202-203.

In the case of *Bertelsen v. Cooney,* 213 F(2) 275 (5th Cir. 1954), a doctor challenged the constitutionality of the section of the Universal Military Training Act authorizing the President to require special registration for military duty of doctors, dentists, and allied specialists. He contended the Act was unconstitutional because, *inter alia,* doctors were *not needed for present uses,* but only to create a future pool, because there were *already sufficient doctors* in the Medical Reserve Corps, and because *"the war powers of Congress are proportionate to the necessity for their exercise," and that they had been exercised in excess of such necessities.* Finally, he maintained that "the Act is 'arbitrary, unreasonable and unnecessary' in its provisions and enforcement to such an extent as to deny appellant due process under the Fifth Amendment." Id. at 276. The Court answered:

> "Petitioner concedes, as indeed he must in the light of the adjudicated cases, that under Art. I, sec. 8, of the Constitution, Congress has the power to raise and support armies, to maintain a Navy, and to draft personnel for service therein. This power exists in peace time as well as in war. *The power is plenary. It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed. These matters are confided to Congress*

and its agencies. United States ex rel. Goodman v. Hearn, 5 Cir., 153 F.2d 186; *United States v. Macintosh,* 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; *Falbo v. United States,* 320 U.S. 549, 64 S. Ct. 346, 88 L. Ed. 305; *United States v. Henderson,* 7 Cir., 180 F.2d 711; *United States v. Cornell,* D. C., 36 F. Supp. 81; *Warren v. United States,* 10 Cir., 177 F.2d 596; *Bronemann v. United States,* 8 Cir., 138 F.2d 333."

* * * * *

"[I]t was never intended to limit the war powers of Congress nor its right to exact public service from all when necessary to meet the public need, *Congress being the sole judge of the necessity and extent thereof. Heflin v. Sanford,* 5 Cir., 142 F.2d 798. Congress is expressly authorized to declare war and to provide for the common defense. These powers necessarily carry with them the power to say *who shall serve in the armed forces,* and in what circumstances." Id. at 276-78. (Emphasis added.)

We will not lengthen this opinion with further citations,[1] except to conclude with this observation of Chief Justice John Marshall in *McCulloch v. Maryland,* 4 Wheat 316, 421, 423, 4 L. Ed. 579, 605-606, (1819):

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

* * * * *

"But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the

---

[1] Interesting reading may be provided by recent articles in the American Bar Association Journal entitled "The Amazing Case of *Kneedler v. Lane*" and "A Judicial Revisitation Finds *Kneedler v. Lane* Not So 'Amazing'" appearing respectively, in the August and the December, 1967, issues of the Journal.

degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such power."

Judgment is affirmed.

JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered February 8, 1968.)

Appeal from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL D. REUSS,

Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1214.

DONALD SMELTZ BUTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI.

RALPH RUDD,
RUDD, OBER & MILLER,
Public Square Building,
33 Public Square,
Cleveland, Ohio 44113,
Attorneys for Petitioner.

(Attorneys for Respondent on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

ERWIN N. GRISWOLD,
Solicitor General of
the United States,
Department of Justice,
Washington, D. C.,

MERLE M. MCCURDY,
United States Attorney,

JAMES OAKAR,
Assistant United States Attorney,
Federal Building,
Cleveland, Ohio 44114,
Attorneys for Respondent.

EXCERPT FROM TABLE OF CONTENTS OF APPELLANT'S APPENDIX IN COURT OF APPEALS.

LIST OF MATTER DESIGNATED FOR INCLUSION IN DEFENDANT-APPELLANT'S APPENDIX BUT NOT PRINTED HEREIN.

[Note: The following items originally designated for inclusion in the Appendix are not printed in this volume, but pursuant to motion of the appellant granted by the court on February 9, 1967 four copies of the exhibits in which they appear have been filed with the court. In those copies of the exhibits the designated items have been marked in red ink for ready identification.]

17. From defendant's Exhibit 7 (110 CR 15365-15372), the following portions of the speech of Senator Nelson:

A. Defendant's Exhibit 7A (110 CR 15365), column 1, lines 5 to 11, beginning "A plan to end the draft in 1967" and ending "* * * with me on the bill."

B. That portion of the speech of Senator Nelson that begins on defendant's Exhibit 7A (110 CR 15365) in column 2 at line 12 ("My own study has led me to this conclusion: * * *") and ends on defendant's Exhibit 7F (110 CR 15370), column 2, line 29 ("* * * be printed at the conclusion of my remarks.").

18. From defendant's Exhibit 7 the following portions of the speeches by Senator McGovern and Senator Keating:

A. On Exhibit 7G (110 CR 15371), column 1, line 5 ("AN ALTERNATIVE TO THE MILITARY DRAFT BY 1967") through line 12 ("* * * remarks on the military draft.").

B. Exhibit 7G (110 CR 15371), column 1, from line 27 ("The present system seems to me to be * * *") through line 42 ("* * * their heads.").

C. Exhibit 7G (110 CR 15371), column 1, line 52 ("MR. KEATING. I congratulate the * * *")

through Exhibit 7G (110 CR 15371), column 2, line 2, the first two words ("* * * fair statement.").

D. From defendant's Exhibit 7G (110 CR 15371), column 2, line 39 ("MR. KEATING. I thank the Senator.") through the end of defendant's Exhibit 7G (110 CR 15371).

19. From defendant's Exhibit 10, that portion of the speech of Senator Nelson made on February 9, 1965 that begins on Exhibit 10A (111 CR 2327 [temporary pagination]), column 3, line 4 ("A PAY RAISE FOR MEN IN THEIR * * *") and ends on defendant's Exhibit 10D (111 CR 2330 [temporary pagination]), column 2, lines 56 and 57 ("* * * pay raise for men in their first two years of service.").

20. From defendant's Exhibit 10 that portion of another speech by Senator Nelson on February 9, 1965 that begins on Exhibit 10G (111 CR 2333 [temporary pagination]), column 3, line 14 ("TOWARD ENDING RELIANCE ON THE MILITARY DRAFT"), and ends at the conclusion of the extension of his remarks on defendant's Exhibit 10J (111 CR 2336 [temporary pagination]), column 1, line 36 ("* * * a draftless military will have been taken.").

21. From defendant's Exhibit 14A, the statement of Representative Robert Ellsworth, the following portions:

A. From page 9756, line 9 ("STATEMENT OF HON. ROBERT ELLSWORTH, REPRESENTATIVE FROM KANSAS"), through line 39 ("* * * would require new legislation:").

B. Page 9757, line 13 ("There are four basic alternatives to the current system: Obligated * * *") through line 22 ("* * * seek; it is in fact what they came to avoid.").

C. From page 9758 the following language from lines 31 and 41 to 43:

"The concept of universal military training is abhorrent. * * * I am unalterably opposed to such a

program as undemocratic. The draft is justifiable only for military purposes—and only then when absolutely necessary. * * *"

D. From page 9759, lines 5 through 8 "I also oppose a lottery system * * * a totally irrational one.").

E. From page 9759, line 36 ("The basic concept which the Congress should accept is that the * * *") through page 9761, line 3 ("When we are determined to do it, it will be done.").

22. From defendant's Exhibit 14B, the testimony of Representative Curtis beginning on page 9784, line 7 ("STATEMENT OF HON. THOMAS B. CURTIS, REPRESENTATIVE FROM MISSOURI") through page 9786 line 44 ("* * * discussed in the Congressional Record, volume 106, part 7, pages 8446-8447.").

23. From Exhibit 14C, further evidence presented by Representative Curtis, from page 9790, lines 8 and 9 ("STATEMENT OF HON. THOMAS B. CURTIS, OF MISSOURI, BEFORE SENATE ARMS SERVICES COMMITTEE, MARCH 3, 1959") and that portion of his statement that begins on page 9791, line 54 ("I am concerned with the efficacy of the draft law in providing the type of * * *") and ends on page 9793, line 12 ("* * * you take the time to make this study.").

24. From Exhibit 14D, pages 9798 and 9799, a portion of the speech of Representative Lindsay in the House of Representatives on April 21, 1964 as follows:

A. From page 9798, line 25, the words: "MR. LINDSAY." From page 9798, line 49 ("My concern here today goes beyond * * *") to page 9799, line 54 ("* * * not have it in this area of our society as in others.").

25. From defendant's Exhibit 14E, the speech of Representative Taft in the House of Representatives on April 21, 1964, the following portions:

A. The last three lines on page 9802 and the first line on page 9803, the following language:

"Mr. Speaker, I would like to insert at this point the following memorandum that has been prepared for the use of the Members who have joined in this study group:

" 'MILITARY MANPOWER AND THE DRAFT' "

B. From page 9804, line 32 ("II. ARGUMENTS OFFERED FOR THE PRESENT SYSTEM.") through page 9807, line 51 ("* * * houses of prostitution, gambling joints, etc.").

C. From page 9808, line 60 ("V. REQUIREMENTS OF A GOOD MILITARY MANPOWER SYSTEM") through the end of page 9809 ("* * * in the light of its findings.").

26. From defendant's Exhibit 14F, the speech by Representative Del Clawson in the House of Representatives on April 21, 1964, page 9822, line 29 ("MR. DEL CLAWSON. Mr. Speaker, my distinguished colleague from New Hamp—* * *") to page 9823, line 40 ("Let us not do so any longer.").

27. From defendant's Exhibit 14G, the statement of Representative Kastenmeier, the following excerpts:

A. From page 9872 the following words:

"STATEMENT OF HON. ROBERT W. KASTENMEIER, A REPRESENTATIVE FROM WISCONSIN.

"Mr. Kastenmeier."

B. From page 9873, lines 1 ("The only reasonable alternative * * *") through line 7 ("* * * have in the past.").

C. From page 9875 the last three lines beginning, "As I mentioned earlier, * * *" through the first two lines on page 9877 ending "* * * these same objectives in our Military Establishment as well."

28. From defendant's Exhibit 14H, statement of Representative Tunney, the following excerpts:

A. From page 9877 the following words:

"STATEMENT OF HON. JOHN V. TUNNEY, REPRESENTATIVE FROM CALIFORNIA.

"MR. TUNNEY."

B. From page 9879, line 8 ("Due to the war in Vietnam, the percentage of new military personnel * * *"), through page 9880, line 23 ("* * * American men all of whom have volunteered to be there.").

29. From Exhibit 14I, the statement of Thomas D. Morris, Assistant Secretary of Defense, the following excerpts:

A. From page 9923, line 27 ("STATEMENT OF HON. THOMAS D. MORRIS, ASSISTANT SECRETARY * * *"), through the first word of line 37 ("* * * decade.").

B. From page 9938, line 22 "*(4) would improvements in pay and other manpower practices enable* * * *"), through page 9940, line 46 ("* * * ditions of full employment, and to continue attracting more volunteers.").

30. From Exhibit 14K, the statement by Mr. Slatinshek, beginning with the last line on page 9981 and ending with the end of the letter he presented to the committee on page 9983, line 30 (*"Acting General Counsel."*).

SUPREME COURT ... 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1214

DONALD SMELTZ BUTLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

MELVIN L. WULF
JOHN C. GRAY, JR.
156 Fifth Avenue
New York, N. Y. 10010

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio 44114

Attorneys for Amicus Curiae

INDEX

PAGE

Interest of Amicus 1

Statement of Facts Insofar as They Affect Amicus' Position 4

Reason for Granting the Writ 5

Argument

Compulsory military service is such a severe deprivation of individual liberty that the constitutional guarantee of due process under the Fifth Amendment must permit a defendant who refuses to submit to induction to challenge the constitutional validity of the induction order on the grounds that at the time he refused to submit there was no such overriding need of national security in terms of manpower demands which could not be satisfied through less onerous means than a compulsory draft 5

Conclusion 13

Table of Authorities

Cases:

Aptheker v. Secretary of State, 378 U. S. 500 (1964) .. 5, 7

Cafeteria Workers v. McElroy, 367 U. S. 886 (1961) 6

Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924) 10

PAGE

Edwards v. California, 314 U. S. 160 (1941) 5
Ex parte Milligan, 71 U. S. 2 (1866) 8
Ex parte Endo, 323 U. S. 283 (1944) 8

Galvan v. Press, 347 U. S. 522 (1954) 7
Gomillion v. Lightfoot, 270 F. 2d 594 (5th Cir. 1959) 12
Griswold v. Connecticut, 381 U. S. 479 (1965) 7

Hamilton v. Kentucky Distilleries & Warehouse Commission, 251 U. S. 146 (1919) 7n, 8n
Harmon v. Brucker, 355 U. S. 579 (1958) 8

Illawara District County Council v. Wickham, 101 Commw. L. R. 467 (Austl. 1959) 8n

Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963) 8

Meyer v. Nebraska, 262 U. S. 390 (1923) 5, 7

Pierce v. Society of Sisters, 268 U. S. 510 (1925) 7

Reid v. Covert, 354 U. S. 1 (1957) 8

Selective Draft Law Cases, 245 U. S. 366 (1918) 9
Shelton v. Tucker, 364 U. S. 479 (1960) 6

Truax v. Raich, 239 U. S. 33 (1915) 5, 7

United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 8n
United States v. Howe, 17 U. S. C. M. A. 165, 37 C. M. R. 429 (1967) 6
United States v. Macintosh, 283 U. S. 605 (1931) 9
United States v. Robel, 389 U. S. 258 (1967) 7, 8n, 11
United States v. Russell, 80 U. S. 623 (1871) 10

PAGE

West Virginia Bd. of Education v. Barnette, 319 U. S. 624 (1943) 11
Whitney v. California, 274 U. S. 357 (1927) 10
Wolff v. Selective Service Local Bd. No. 16, 372 F. 2d 817 (2d Cir. 1967) 8
Woods v. Miller, 333 U. S. 138 (1948) 8

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952) 8

United States Constitution:

Art. I, Sec. 8, Cls. 15, 16 9
Fifth Amendment 2, 5, 7

Statute:

Uniform Code of Military Justice, *passim*, 10 U. S. C. §§801 *et seq.* 6

Other Authorities:

110 Cong. Record 8575-6 (April 21, 1964) 6n
Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 Harv. L. Rev. 692 (1948) 12
Note, *The Presentation of Facts Underlying Constitutionality of Statutes*, 49 Harv. L. Rev. 631 (1936) 12
Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* (1967) 6-7n
Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* (1963) 7n, 12
Wiener, *The Military Clause of the Constitution*, 54 Harv. L. Rev. 181 (1941) 9n

In the

Supreme Court of the United States

October Term, 1967

No. 1214

Donald Smeltz Butler,

Petitioner,

—v.—

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus*

The American Civil Liberties Union is a non-profit, non-partisan membership corporation with 42 affiliates in thirty-eight states, and local chapters in most of such affiliates. Nationwide membership is approximately 115,000. Since its inception in 1920 amicus curiae has been committed to the securing and protection of the civil liberties and civil rights which are guaranteed by the United States Constitution. Amicus is not concerned with and takes no position on questions of foreign policy and military policy, or any

---

* Written consents by the attorneys for both parties have been filed with the Clerk.

questions other than individual liberties and constitutional rights.

This case involves one of the most fundamental constitutional rights, the right not to be deprived of one's liberty without due process of law. This is a right which is guaranteed to all persons by the Fifth Amendment.

A fuller statement of the interest of amicus may be presented by setting forth policy positions taken by the Board of Directors of the American Civil Liberties Union at its annual plenary meeting on January 30, 1966. Following an introductory historical statement, amicus' Board of Directors adopted the following policy position on "Military Conscription":

> "In 1940, Congress adopted the first peacetime draft act in the history of the United States, making clear its belief that a grave crisis in world affairs warranted departure from democracy's traditional abhorrence of compulsory military service. Since then the nation has lived almost constantly with military conscription. The passage of twenty-five years would alone warrant reconsideration of the implications of conscription for individual liberty. The urgency of reconsideration is underscored by the danger that conscription, originally viewed as a temporary expedient occasioned by emergency, is becoming institutionalized. It is an accepted part of life; many citizens have grown to maturity almost without knowing a time when it did not exist.
>
> *Thus it is necessary once again to assert that compulsory military service, whether in time of war or peace, is always a severe deprivation of civil liberties. . . . [S]uch deprivation of liberty, through conscription,*

may only be warranted by the overriding need of national security, in time of war or the imminent danger of war.

To state this proposition does not dispense with the hard problem of determining when the point of 'overriding need' is reached. This is unquestionably a terribly difficult decision for the citizen to make, especially when the emotions surrounding the subject of 'national security' are stirred and modern warfare assumes so many different forms. The ordinary citizen is not a military or political expert, nor is he privy to all the information that government has at its command to help shape its policies. But these difficulties still do not relieve the free citizen of a free society of his responsibility for making choices. There is no escape from the need to evaluate whether personal liberty must in any given instance be sacrificed to the 'impulse of self-preservation,' unless we cease being a free society and forfeit the right and duty of the governed to judge whether conditions warrant the conscription *their* government proposes." [Emphasis added.]

Amicus has taken no position on the merits of the constitutional argument on the facts of this case. We do not argue that the draft was constitutional or unconstitutional on February 4, 1964, or on any other day. But we do maintain that since military service is always a severe deprivation of civil liberties, any individual, including petitioner here, should have the right to challenge its constitutionality. This essentially procedural right was denied by the trial court's action in refusing to hear evidence relevant to the

claim of unconstitutionality, and by the Court of Appeals in affirming such refusal. We urge that the courts below erred in this respect, and since this is the essential question raised in the petition for certiorari, amicus supports petitioner, and urges that a writ of certiorari be granted.

Statement of Facts Insofar as They Affect Amicus' Position

It was petitioner's position below that on the day he was ordered to report for induction, February 4, 1964, there was no such overriding need of manpower to satisfy the demands of national security as could not have been met by means less onerous than a compulsory draft. The petition suggests that the nation's military manpower needs could have been more than satisfied if reasonable steps were taken to encourage voluntary recruitment (pp. 6-11).

Petitioner sought to prove his case below through the introduction of data assembled by a Defense Department study of the draft, expert testimony, and other documentary evidence, including principally, statements made by members of Congress and testimony before a congressional committee by the Assistant Secretary of Defense in charge of manpower. The District Court refused to allow petitioner's counsel to introduce such documentary and expert testimony, and attempts to elicit such testimony via subpoena met with the same result.

The Court of Appeals affirmed, holding in essence, that since "the evidence proffered to prove unconstitutionality would not in its totality, and under a view most favorable to the defendant, prove unconstitutionality . . . " —— F. 2d at —— (Pet. 17a), the District Judge did not have the

power "to entertain the contest presented by appellant," —— F. 2d at —— (Pet. 23a).

Reason for Granting the Writ

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Argument

Compulsory military service is such a severe deprivation of individual liberty that the constitutional guarantee of due process under the Fifth Amendment must permit a defendant who refuses to submit to induction to challenge the constitutional validity of the induction order on the grounds that at the time he refused to submit there was no such overriding need of national security in terms of manpower demands which could not be satisfied through less onerous means than a compulsory draft.

1. As stated in amicus' policy statement on military conscription, it must be asserted that "compulsory military service, whether in time of war or peace, is *always* a severe deprivation of civil liberties." This is a proposition which is hardly debatable. Conscription restricts individual liberty of movement, residence, and travel. See *Edwards* v. *California,* 314 U. S. 160 (1941); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). It is a restriction on the right to engage in one's occupation. See *Truax* v. *Raich,* 239 U. S. 33 (1915); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). It likewise restricts freedom of speech and association, see

Shelton v. *Tucker,* 364 U. S. 479 (1960), inasmuch as persons in the military obviously do not have the same degree of freedom of expression and association as persons in civilian life, *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961); *United States* v. *Howe,* 17 U. S. C. M. A. 165, 37 C. M. R. 429 (1967). Furthermore, it subjects the individual to military law, as well as military commands, and thereby imposes a more restricted standard of behavior than that available to persons in civilian life. See Uniform Code of Military Justice, *passim,* 10 U. S. C. §§801 *et seq.*

In addition, it makes the individual, regardless of his wishes, an instrument of the foreign and military policy of a government which he may disagree with, either generally or specifically. Yet he has no choice but to obey his military orders requiring him to be such an instrument.[1]

No citations are needed to emphasize the most egregious deprivations effected by a military draft: severe bodily injury, maiming for life, and in many cases death. Perhaps the only thing which might be more severe than deprivation of life, is requiring an individual to become a killer of others. This is the ultimate deprivation of liberty imposed by a military draft.[2]

---

[1] "By handing boys over to the arbitrary and complete domination of the Government, we put it in the power of the Government to indoctrinate them with political doctrines then popular with the Government. In wartime it is bad enough; in peacetime it would be intolerable." Senator Robert A. Taft, quoted in statement by Rep. Lindsay, 110 Cong. Record 8575-6 (April 21, 1964).

[2] The draftee's loss of liberty is accompanied by a severe loss of property. In peacetime, it is a substantial question whether the state may raise armies by a system of in kind taxation on the services of young men which admittedly falls on only a percentage of even those fit for military service [see, e.g., Report of the National Ad-

2. The due process clause of the Fifth Amendment protects "certain fundamental personal liberties from abridgment by the federal government", *Griswold* v. *Connecticut*, 381 U. S. 479, 492 (1965) (concurring opinion by Mr. Justice Goldberg). If these personal liberties protected by the Fifth Amendment include freedom of travel, *Aptheker* v. *Secretary of State, supra;* right of privacy, *Griswold* v. *Connecticut, supra;* right to employment, *Truax* v. *Raich, supra;* right to attend private religious school in lieu of public school, *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); and right to instruction in a foreign language, *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400 (1923); then *a fortiori,* the Due Process Clause must include the protection of a fundamental personal liberty which is infinitely more dear, the liberty to be free from compulsory military service, and ultimately to be free of the risk of death and the compulsion to kill others.

3. This Court has held this term that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." *United States* v. *Robel,* 389 U. S. 258, 263 (1967). It has previously held that the Due Process Clause is a limitation on all governmental power, "even the war power" *Galvan* v. *Press,* 347 U. S. 522, 530 (1954).[3] Neither Congress, nor any executive authority,

---

visory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?,* pp. 17-29, 57-59 (1967)] rather than by financial taxation of the nation as a whole to pay the actual economic value of the services of our military men.

[3] The Court below observed that the statement by this Court of constitutional limitations on the war power in *Galvan* v. *Press, supra,* was dictum, and that in another case, *Hamilton* v. *Kentucky Distilleries & Warehouse Commission,* 251 U. S. 146 (1919), notwithstanding a similar statement of constitutional limitation, this

can simply invoke the war power, and claim that it has thereby freed itself from due process and other constitutional limitations. See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963); *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (2nd Cir. 1967). The Constitution and all of its limitations, apply "equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan,* 71 U. S. 2, 120 (1866). See also *Ex parte Endo,* 323 U. S. 283 (1944); *Reid* v. *Covert,* 354 U. S. 1 (1957); *Harmon* v. *Brucker,* 355 U. S. 579 (1958). As Mr. Justice Jackson observed, concurring in *Woods* v. *Miller,* 333 U. S. 138, 146-147 (1948), whenever the war power is invoked "the constitutional basis should be scrutinized with care." [4]

Court "found no fault in the Congressional action there involved." —— F. 2d —— (Pet. 24a). That this Court has not hesitated to *enforce* constitutional limits on the war power is clear from a large number of decisions. See, e.g., *United States* v. *Robel,* 389 U. S. 258, 263-264 (1967); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 587 (1952); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 88 (1921) (". . . the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments"). In the *Hamilton* case, this Court held that the World War I emergency which justified the legislation was not yet over, and added "But the exercise of the war powers . . . is subject to the Fifth Amendment." 251 U. S. at 155. Cf. *Illawara District County Council* v. *Wickham,* 101 Commw. L. R. 467 (Austl. 1959), a decision of Australia's highest court, described by Chief Justice Warren as "invalidating a far reaching veteran's preference statute on the grounds that with the World War II emergency past, the war power justification for such laws, under the Australian Constitution, had ceased." Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 110, n. 50 (1963).

[4] The founding fathers were well aware that control of the federal government's power to turn citizens into soldiers involved serious

Citing the *Selective Draft Law Cases*, 245 U. S. 366 (1918), which upheld the constitutionality of the World War I draft, the Court below implies that the constitutionality of conscription is so self-evident that under no set of facts would the District Court have had power to entertain a test of constitutionality. —— F. 2d at —— (Pet. 24a, 23a). But even in the case of the World War I conscription legislation, enacted by Congress "as the result of a war declared by the great representative body of the people", 245 U. S. at 390, this Court spoke of "the reciprocal obligation of the citizen to render military service *in case of need* . . ." 245 U. S. at 378. (Emphasis added.)

In *United States* v. *Macintosh*, 283 U. S. 605 (1931), this Court upheld, by a vote of 5-4, the constitutionality of a statute which compelled an oath to bear arms as a condition of naturalization. Invoking the war power, this Court qualified its decision by noting that such invocation was proper "when necessity calls for its exercise", and that there might nonetheless be "qualifications or limitations . . . found in the Constitution." 283 U. S. at 622.[5] It follows that there

---

questions of individual liberty. The Constitution provides a complex system of divided authority for the regulation of the militia, the compulsory "citizens' army" of the eighteenth century. Art. I, Sect. 8, Cls. 15, 16. See generally Wiener, *The Military Clause of the Constitution*, 54 Harv. L. Rev. 181 (1941). While the specific requirements of the militia clauses may have only indirect relevance to the problems of modern military organization, they do illustrate the need for some limitation on governmental power in this critical area. The Due Process Clause is the flexible instrument which can provide protection for the individual from unnecessarily coercive governmental power while respecting legitimate state interests.

[5] The *Macintosh* majority listed among the war powers: restrictions on freedom of speech and press and trial by jury; confiscation of property without compensation; fixing of prices; taking over of railroads; ". . . and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war." 283 U. S. at 622.

must be some manner of testing whether "necessity calls for its exercise", some mode whereby a determination can be made if there are any constitutional "qualifications or limitations." Certiorari should be granted, amicus urges, so that this Court can rule as to where, how and when these vital determinations should be made.

4. Amicus submits that many of the authorities set forth in the petition plainly establish the appropriateness of presenting factual evidence of unconstitutionality. Mr. Justice Holmes observed in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 548 (1924), that factual allegations tending to prove unconstitutionality " . . . cannot be declared offhand to be unmaintainable." Amicus respectfully suggests that the trial court disregarded Mr. Justice Holmes' apt observation in that it "declared offhand" that defendant's allegations were not merely unpersuasive, but were "unmaintainable."

When a legislature takes action based on a declared state of emergency, this does not render its action beyond challenge. See cases cited in paragraph 3, *supra*. The most that can be said for the legislative declaration is that it is "a rebuttable presumption" that the declared emergency exists.[6] See *Whitney* v. *California*, 274 U. S. 357, 378-379 (1927) (concurring opinion by Mr. Justice Brandeis). If it is a rebuttable presumption, there must, *ipso facto*, be an opportunity to rebut it. Amicus submits that the courts below refused to allow any such opportunity. They held in

[6] "Exigencies of the kind do arise in time of war or impending national emergency, but it is the emergency . . . that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified." *United States* v. *Russell*, 80 U. S. 623, 628 (1871).

effect that it was not a rebuttable presumption, but a conclusive presumption.

In a recent case in which the government attempted to justify a statute as an exercise of the war power, this Court said,

> "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated. See *Schneider* v. *New Jersey*, 308 U. S. 147." *United States* v. *Robel*, 389 U. S. 258, 264 (1967).

That the "task" in this case of court review of the reasonableness of Congressional action will be both "delicate and difficult" cannot justify the lower courts' abdication of their judicial role. It is the willingness of the courts to consider the legally and politically difficult issues which is the bulwark of the principle of limited government. In the words of Mr. Justice Jackson, "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

The Chief Justice has written:

> ". . . if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit

of the claim of necessity must be kept to an absolute minimum." Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 102 (1963).

In this case, thus far, the judiciary has indeed refrained "from examining the claim of necessity." Amicus urges that in the light of the enormous public importance of the underlying question, this Court should grant certiorari and thereby allow such examination to take place.

It need only be added, that in amicus' view, all of the modes of testimony which petitioner sought to offer to the trial court in support of the claim of unconstitutionality were competent. See Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts,* 61 Harv. L. Rev. 692 (1948); Note, *The Presentation of Facts Underlying Constitutionality of Statutes,* 49 Harv. L. Rev. 631 (1936). Especially when there are constitutional questions at stake, courts should not close their eyes to the relevant statements of "individual legislators, either in legislative chambers or through the press." *Gomillion* v. *Lightfoot,* 270 F. 2d 594, 610 (5th Cir. 1959) (dissenting opinion by Circuit Judge Brown), reversed 364 U. S. 339 (1960).

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

March, 1968

Respectfully submitted,

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

MELVIN L. WULF
JOHN C. GRAY, JR.
156 Fifth Avenue
New York, N. Y. 10010

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio 44114

Attorneys for Amicus Curiae

LIBRARY
SUPREME COURT, U. S.

FILED
APR 10 1968
JOHN F. DAVIS, CLERK

No. 1214

In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD SMELTZ BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1214

DONALD SMELTZ BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving trial by jury, petitioner was convicted by the United States District Court for the Northern District of Ohio of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 456, 462. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 16a).

Petitioner's sole defense at trial was that the Universal Military Training and Service Act was unconstitutional because conscription was not necessary in order to maintain the strength of the Armed Forces needed at the time of his induction. The district court refused petitioner's request to subpoena the Secre-

296-402—68

tary of Defense and to introduce other evidence which he claimed would show that the Congressional purpose to provide for the common defense could have been accomplished by voluntary recruitment if increased pay and opportunities for training had been offered as incentives for enlistment (Pet. 6–8).

The court below properly held that petitioner was not entitled to present such evidence at the trial. Both methods of raising and supporting armies—by conscription or by volunteers, in peacetime and in war—are constitutional. *Selective Draft Law Cases,* 245 U.S. 366; *Richter* v. *United States,* 181 F. 2d 591, 593 (C.A. 9); *Bertelson* v. *Cooney,* 213 F. 2d 275 (C.A. 5), certiorari denied, 348 U.S. 856. The desirability of maintaining a military draft together with a volunteer military service is a matter for legislative judgment, and in fact has received careful legislative study. A "wide latitude of discretion must be accorded" "Congress in the exercise of its powers", and "every reasonable intendment must be made in favor of [the] continuing validity" of the congressional determination. *Hamilton* v. *Kentucky Distilleries Company,* 251 U.S. 146, 163; see *Coleman* v. *Miller,* 307 U.S. 433, 453–454. Even assuming that the draft law might be unconstitutional if the legislation had no rational basis in fact, the evidence offered by petitioner, by his own characterization, fell far short of meeting that burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

APRIL 1968.